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No. 128, Original

In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

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Both the United States and the State of Alaska base their opposition to the motion to intervene in this litigation upon two principal arguments: 1) the Proposed Interveners have no stake in this litigation sufficiently separate and distinct from those of the public at large; and 2) the interests of the Proposed Interveners will be adequately represented in these proceedings by the United States. Both arguments are incorrect.

Analysis

The Proposed Interveners' legal rights and interests will be uniquely affected by the outcome of this litigation. As native rural Alaskans who live and work on one of the islands located next to the waters of the Tongass National Forest covering the submerged lands at issue here, the Proposed Interveners' right to continue their traditional and customary harvest of herring roe on kelp at that location is recognized and protected by federal law. As the Congress declared in 16 U.S.C. § 3111:

> The Congress finds and declares that -
>
> (1) the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.
>
> (2) the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses;

The Proposed Interveners and their ancestors have engaged in this harvest in those waters since long before the founding of the United States. Under federal law, the Secretary of the Interior is required to ensure that people such as Proposed Interveners, who are actually engaged in subsistence uses, have reasonable access to the resources necessary to those uses located on public lands or the waters over them. 16 U.S.C. § 3121(a). The right protected by federal law to continue this traditional form of subsistence food-gathering in the waters above the submerged lands in the Tongass National Forest at issue in this litigation is unique to the Proposed Interveners; no one else seeks to do so. Proposed Interveners' interest is, therefore, very much akin to the sort of interest that both Alaska and the United States concede would justify Proposed Interveners' participation as parties to this litigation. Brief For The United States In Opposition ("U.S. Opposition") at 10; Opposition of Plaintiff State Of Alaska To Motion For Leave To Intervene And File Answer ("Alaska Opposition") at 10. Under Alaska's statutory scheme for the control of harvesting herring roe on kelp, Proposed Interveners' right to conduct their harvest, a right which is shared with no other people, would be greatly restricted. Clearly, the Proposed Interveners do not have the sort of diffuse, general interest that does not support intervention. They have a unique interest that could be irreparably impaired by the outcome of this litigation and should be allowed to intervene. *See, e.g., Arizona v. California,* 460 U.S. 605 (1983); *Maryland v. Louisiana,* 451 U.S. 725 (1981).

The Proposed Interveners' unique interest is highlighted by the circumstances showing why the Proposed Interveners should not be compelled to rely upon the United States to represent its interests in this litigation. Because the Department of the Interior and the Federal Subsistence Board refused to assert federal ownership of the submerged

lands within the Tongass National Forest at issue here and even went so far as to *disclaim* federal ownership, Proposed Interveners were forced to commence suit in the District Court for the District of Alaska to defend their rights under federal law. Because the results of this litigation will control Proposed Interveners' rights, the Proposed Interveners' lawsuit in District Court has been stayed pending completion of these proceedings. After nearly ten years of litigation, in which the United States Government took precisely the opposite position it takes here, that Government and the State of Alaska now tell the Proposed Interveners that they should be content to have their rights conclusively adjudicated in a proceeding to which they cannot become parties and cannot exercise any control over settlement or other disposition. These circumstances clearly demonstrate not only the Proposed Interveners' unique stake in the outcome of this litigation, but also the manifest unfairness of forcing them to rely upon their opponent in the Alaska District Court litigation for the past ten years to vigorously advocate their position in this case. What assurance do the Proposed Interveners have that the United States will not once again change its position on the ownership of the submerged lands in the Tongass National Forest? The Proposed Interveners are entitled to a day in court and, as a practical matter, this is the only Court in which they can be heard effectively.

Conclusion

Clearly, the Proposed Interveners have an interest and stake in the outcome of this litigation that sets them apart from the general public that normally must rely upon the sovereign to represent their interests in litigation. The Proposed Interveners will be uniquely affected by the outcome here and should be allowed to participate as parties. The Proposed Interveners should not have to rely upon their

long-time opponent in the Alaska District Court litigation to represent their interests adequately in these proceedings. The Motion For Leave To Intervene And Serve An Answer should be granted.

Dated: April 17, 2001 Respectfully submitted,

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